APPENDIX.

Opinion of the United States Circuit Court of Appeals for the Seventh Circuit.

Before Evans, Major and Kerner, Circuit Judges.

Kerner, Circuit Judge. In this case two indictments were returned by the grand jury against the appellants, Monarch Distributing Company and Joseph S. Meyer, together with Lee Miller and Thomas W. Moore.

Indictment No. 15,126 charged appellants and Lee Miller with violating Title 26, U. S. C. A., Sec. 2857, 53 Stat. 327, by falsifying certain records required to be kept under internal revenue laws and regulations. Said section of the statute requires every wholesale liquor dealer to keep daily a record of distilled spirits received and disposed of by him, in such form as may be prescribed by the Commissioner of Internal Revenue. It further provides that every wholesale liquor dealer who neglects to make entries therein shall, on conviction, be fined not less than $100 nor more than $5,000 and be imprisoned not less than three months nor more than three years.

Indictment No. 15,129 charged appellant Monarch Distributing Company and defendants Thomas W. Moore and Lee Miller with violating Title 26 U. S. C. A. Sec. 2857 (53 Stat. 327), Title 26 U. S. C. A. Sec. 3793 (53 Stat. 468), and Title 18 U. S. C. A. Sec. 390 (35 Stat. 1137) which provides:

> "Whoever shall knowingly ship or cause to be shipped, from one state, * * * any package of or package containing any spiritous, vinous, malted, fermented, or other intoxicating liquor of any kind, unless such package be so labeled on the outside cover as to plainly show the name of the consignee, the nature of the contents, and the quantity contained therein, shall be fined not more than $5000."

The last count of each indictment charged conspiracy.

The indictments were consolidated for trial. A jury was waived and the cases were tried before the Court. The defendants Lee Miller and Thomas W. Moore were not placed on trial. The District Court in 15,126 found both appellants guilty upon all counts excepting count 11 and sentenced Joseph S. Meyer to imprisonment for a term of two years and to pay a fine of $1000 and ordered Monarch Distributing Company to pay a fine of $2500. In 15,129 the court found Monarch Distributing Company guilty upon all counts and ordered that it pay a fine of $2500. To reverse the judgments Meyer and the Monarch Distributing Company have appealed.

Count one of the indictment in 15,126 charges that on July 21, 1939 the Monarch Distributing Company and Joseph S. Meyer, its employee, who was in possession and control of the books and records of the corporation, did unlawfully, willfully, etc. make a certain false entry on a certain record required to be kept, known as Treasury Department Form 52A, purporting to represent that certain alcoholic spirits were received on July 22, 1939; that said entry was false in that the alcoholic spirits were in fact received on July 20; that said entry was further false in that it was not made on July 22, but was in fact made on July 24, 1939.

The record discloses that the Monarch Distributing Company operated a wholesale liquor business at East St. Louis, Illinois, and that Meyer was one of its employees. On July 20, 1939, the Skye Distributing Company sold and delivered to the Monarch Distributing Company 41 cases of liquor and at the time of the delivery a check in payment of a portion of this liquor was given by Meyer to the driver delivering the liquor. On the morning of July 21 an inspector of the Alcohol Tax Unit, in the course of his duties, inquired of Meyer if all receipts of merchandise had been recorded on Form 52A and was told that all

entries had been made. Thereupon the record was checked, but it showed no entry of the receipt of the liquor received on July 20. Another examination of the record was made at 10 A. M. July 22. This too showed no entry recording the receipt of the liquor. On July 24 an examination disclosed that an entry had been made evidencing the receipt of the liquor as of July 22. This entry was not made prior to 10 A. M. July 24.

The evidence also showed that either on the evening of July 20 or the early morning of July 21, a portion of the liquor had been removed from the boxes in which it had been delivered by the Skye Distributing Company and sold to Melvin Thompson on July 22.

Meyer testified "the shipment arrived in the afternoon of July 21. The next day was Saturday and I was busy. It probably laid on my desk and was not handed to the girl until some time on Monday."

The point is made that appellee introduced no evidence to show there were any regulations concerning the making of the entry. We are unable to see any merit to the point for the reason that the appellants were bound to keep the records prescribed by the statute and make the proper entries whether the Commissioner of Internal Revenue had prescribed any rules and regulations, on the subject or not. Quantity of Distilled Spirits, Fed. Cas. 11494 and United States v. Dutcher, Fed. Cas. 15013. Moreover, there was no necessity for their formal introduction, they being matters of which the courts of the United States take judicial notice. Sprinkle v. U. S., 141 F. 811, 820.

It is next insisted that the fact that appellants did not record the purchase on the day the liquor was received, does not constitute the making of a false entry. To be sure, to constitute the offense of neglecting to make the entry, there must not only be an omission to make the entry, but the failure must be intentional. Arrow Distil-

leries v. Alexander, 109 F. (2) 397, 406. Whether the omission was due to carelessness or design was the province of the District Court to determine from the evidence. In our passing upon the sufficiency of the proof, it is not our province to weigh or determine the credibility of witnesses. We must take that view of the evidence most favorable to appellee and sustain the finding of the trial court if there be substantial evidence to support it. The trial court found the appellants guilty, thus, necessarily, it found that the omission was intentional or by design and we agree there was ample proof of acts and that the reasonable inference flowing therefrom warranted a finding that the appellants acted in bad faith and knowingly violated the statute.

The sixth count of the indictment in 15,126 charged that on October 13, 1939, the appellants made a false entry in their 52B record. This is the daily record of sales required to be kept by a wholesale liquor dealer. It was alleged that the false entry was to the effect that certain described liquor had been sent to Joe Nelson, Leonard, Texas, when, in fact, it had been sent to Joe Nelson, then and there located at Kansas City, Missouri.

On Monarch Distributing Company's 52-B record appears an entry that on October 13, 1939, it sold and sent to Joe Nelson, Leonard, Texas, 38 cases of liquor. The liquor and an invoice was delivered to Riss & Company, a common carrier operating motor vehicles between East St. Louis, Illinois, and Kansas City, Missouri, consigned C. O. D. to Joe Nelson, Kansas City, Missouri. Upon the arrival of the liquor at Kansas City, Missouri, it was delivered to Chester Tork, who paid $649.32 therefor and acknowledge receipt of the liquor by signing the name of Joe Nelson. Tork had the liquor transferred to a Ford truck, which was then driven into Kansas City, Kansas. In that city the truck was stopped by investigators of the

Alcohol Tax Unit, Treasury Department, and Tork and the driver of the truck were placed under arrest. The bill of lading and the original freight bill were found on the person of Chester Tork. There were no words describing or designating the consignee's name or address on the cartons or boxes in which the liquor was contained.

The record further discloses that Chester Tork appeared at the office of the Monarch Distributing Company on July 8, 1939 and there conversed with Joseph S. Meyer. In addition to the shipment of liquor above discussed, there were others, commencing July 27, 1939, consigned to Joe Nelson, Kansas City, Missouri.

During the trial a man in the custody of Government agents was present in the court room. This man did not testify but was identified as Chester Tork.

William E. Grinn, an investigator for the Alcohol Tax Unit, testified that Leonard, Texas, is located in his territory and has a population of 1300; that he made a special investigation of the town relative to locating a person named Joe Nelson, interviewing the postmaster, letter carriers, city marshal, sheriff of the county and his chief deputy, the hotel man and six of the twelve merchants in the town; and that he was unable to locate a person named Joe Nelson.

On September 20, 1939 investigators of the Alcohol Tax Unit informed Meyer that an investigation had disclosed no person named Joe Nelson at Leonard, Texas.

Joseph S. Meyer testified that he knew a person by the name of Joe Nelson of Leonard, Texas; that Nelson came to the office about July 21, tendered a receipt for a retail liquor dealer's permit and gave an order for liquor to be shipped to him at Leonard, Texas, and said he would make future orders by telephone, and pay C. O. D.; that Nelson gave his first order by telephone on July 27 and directed that the liquor be shipped to Kansas City, Missouri, where

it would be picked up by Nelson and taken to Leonard, Texas. On cross-examination Meyer testified that he saw Nelson only once and that Chester Tork was not Nelson.

The first three counts of the indictment in 15,129 charged that on March 27, March 31 and June 30, 1939, the Monarch Distributing Company made false entries in its 52-B record. These counts alleged that the false entries were to the effect that certain described liquor had been sent to Mike O'Brien, Wichita, Kansas, when, in fact, it had been sent to a person or persons other than Mike O'Brien, whose name or names and address or addresses were unknown to the grand jurors.

On Monarch Distributing Company's 52B records appear entries that on March 27 and 31 and June 30, 1939, it sold to and sent to Mike O'Brien, Wichita, Kansas, a designated number of cases of liquor, and invoices bearing Nos. 2088, 2092 and 2132 respectively were issued by the Monarch Distributing Company in which were described the liquor sold and the sale price.

On July 2, 1939, Sidney Kennedy, an investigator of the Alcohol Tax Unit, intercepted an automobile bearing Oklahoma license plates and driven by one Heil Armitage, in which spiritous liquors were found corresponding to the liquors set forth in invoice 2132 issued by the Monarch Distributing Company and entered in the 52B record as having been sold and sent to Mike O'Brien, Wichita, Kansas.

Mike O'Brien testified that in July of 1938 he resided at Wichita, Kansas, but since August he has lived in Belleville, Illinois; that that fact was known to the defendant Moore and that he had not made the purchases of liquor entered on the 52B records under date of March 27 and 31 and June 30, 1939, and evidenced by invoices Nos. 2088, 2092 and 2132. He further testified that he did not know that such merchandise had been consigned in his name and

had not authorized any one to obtain such merchandise in his name.

Appellant adduced the testimony of several employees of the Monarch Distributing Company to the effect that a number of shipments of spirituous liquors were made to O'Brien in the early part of 1939, which were loaded into O'Brien's automobile.

At the conclusion of the trial the District Court stated: "I have eliminated from consideration all hearsay and have reached my conclusion solely upon the competent evidence in the case."

Now, counsel for appellants argues that there is a total failure of proof and that the court erred in admitting the testimony of the witness Grinn.

We are of the opinion that no reversible error was committed by the trial court in permitting Grinn to testify, and it was proper for the court to consider all of the evidence, direct and circumstantial, determine what witnesses it believed or did not believe, and to say whether or not the charges in the indictment had been established beyond a reasonable doubt. This the court has done, rendering a finding against the appellants. After a careful consideration of the entire record, we find nothing to warrant a reversal.

Since we have indicated that the evidence was sufficient as against the appellants under the first and sixth counts of the indictment in 15,126 and the first three counts of the indictment in 15,129, and as the penalty imposed was not more than could have been imposed under them if they had stood alone, we need not consider the other counts of either indictment for the reason that errors, if any were committed under the counts not discussed, are not grounds for reversal, Whitfield v. Ohio, U. S. 431, 438 and Roberts v. U. S., 96 F. (2) 39.

Judgments Affirmed.

No. 704

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1940.

MONARCH DISTRIBUTING COMPANY, a Corporation, and JOSEPH S. MEYER,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

ADDITIONAL REASON RELIED UPON FOR ALLOWANCE OF WRIT OF CERTIORARI, WHICH PETITIONERS PRAY WILL BE CONSIDERED AS A PART OF THE ORIGINAL PETITION FOR WRIT OF CERTIORARI.

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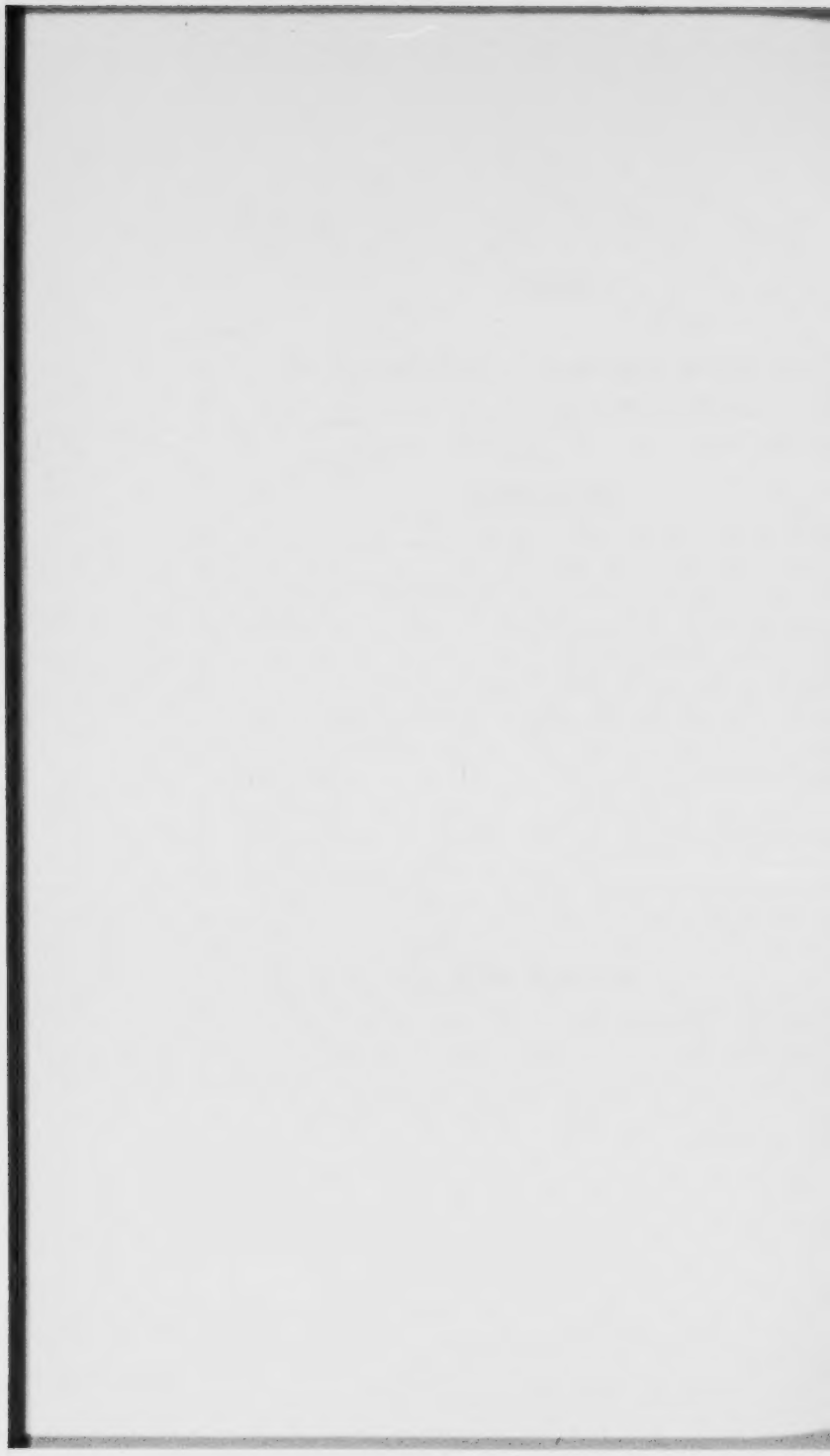

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To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners, by their undersigned counsel, having heretofore filed their petition with this Honorable Court for the issuance of the writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit in the above-entitled cause, and thirty days not having elapsed since rehearing was denied by the Court of Appeals in said case, now submit the following addi-

tional reason for allowance of the writ of certiorari and respectfully pray that this will be considered as a part of their original petition.

The Court of Appeals affirmed the conviction of petitioners upon counts 1 and 6 of indictment 15,126, and the conviction of petitioner Monarch Distributing Company upon counts 1, 2 and 3 of indictment 15,129. Each of these counts charges a violation of an Act of Congress enacted June 26, 1936, which requires rectifiers and wholesale liquor dealers to keep certain records, and which makes falsification of such records a felony.

The counts upon which these convictions have been affirmed do not charge a violation of any law of the United States. The statute upon which these counts are assumed to be predicated says: "Every rectifier and wholesale liquor dealer shall keep daily, at his place of business, covered by his special tax stamp, a record of distilled spirits received and disposed of by him," etc. The third paragraph provides that: "Every rectifier and wholesale liquor dealer who refuses or neglects to keep such records in the form prescribed by the Commissioner of Internal Revenue, * * * or makes any false entry therein," etc., shall be punished.

No one is amenable to the provisions of this statute unless he is a rectifier or a wholesale liquor dealer, and unless he receives and disposes of distilled spirits.

The counts upon which these convictions stand do not allege that petitioners were rectifiers or wholesale liquor dealers, or that they received and disposed of distilled spirits. An indictment which does not contain these necessary allegations does not charge the commission of a crime. These are essential elements of the crime the statute denounces.

Count 1 of indictment 15,126 (R. pp. 2-4, incl.) charges that on July 21, 1939, Monarch Distributing Company was

a corporation "engaged in the business of purchasing and selling vinous and alcoholic spirits and beverages," and that petitioner Joseph S. Meyer was an employee and agent of said corporation. **Nowhere does the count charge that either petitioner was a rectifier or a wholesale liquor dealer, or that either of them received and disposed of "distilled spirits."** The count refers to "vinous and alcoholic spirits and beverages," but does not mention distilled spirits.

The allegations in count 6 of indictment 15,126 (R. pp. 11 and 12) are exactly the same, in this respect, as those in count 1. The same is true of count 1 (R. pp. 29 and 30), count 2 (R. pp. 30-32, incl.) and count 3 (R. pp. 32 and 33) of indictment 15,129.

The offense which the statute creates was unknown at common law. It is strictly a statutory offense. Unless a person is a rectifier or wholesale liquor dealer, engaged in the business of receiving and disposing of distilled spirits, the statute does not apply to him.

The failure to aver that petitioners were wholesale liquor dealers, engaged in the business of receiving and disposing of distilled spirits, is a fatal defect of substance, and not a mere defect of form. It is a defect that may be attacked at any time, before or after judgment. An indictment which fails to allege that petitioners were rectifiers or wholesale liquor dealers will not support a judgment of conviction. The convictions upon these fatally defective counts are subject to challenge and voidable at any time before petitioners have served their sentences and paid their fines.

Failure to attack these indictments in the District Court or the Court of Appeals does not preclude petitioners from attacking them now. Because the omissions constitute defects of substance, petitioners have not waived their right to attack the indictments. These indictments do not fol-

low the language of the statute and do not incorporate all the basic and essential ingredients that make up the offense that is defined and denounced by this statute.

That a person must be a rectifier or a wholesale liquor dealer before he can be prosecuted under this statute is fundamental. The indictment can reach him only if it charges that he is within the class that the statute covers.

The failure of these counts to incorporate necessary allegations plainly appears upon the record of this case. Petitioners respectfully submit that this Honorable Court should take cognizance of this error, despite the fact that it was not called to the attention of the District Court or the Court of Appeals. It is the rule that, where plain error appears from an examination of the record, a judgment of conviction cannot stand.

ADDITIONAL QUESTION PRESENTED.

Can a conviction stand which is predicated on an indictment fatally defective in substance?

Petitioners once more respectfully petition this Honorable Court to consider this additional reason as a part of the petition for the writ of certiorari to be issued.

Respectfully submitted,

HAROLD J. BANDY,
JOHN M. KARNS,
Counsel for Petitioners.

SUPPORTING BRIEF.

I.

The objection that the indictment fails to describe various acts intended to be proved with that reasonable certainty which the law requires, or fails to charge an offense known to the law, or states no offense within the jurisdiction of the Court, is fatal at any stage and is not waived by failure to take advantage thereof at any preliminary stage of the proceedings. Failure to charge definitely essential elements of the offense is not waived by failure to move to quash the indictment or to arrest judgment thereon. Defects of substance are not cured by plea.

31 C. J., pp. 874 and 875;
Oesting v. U. S., 234 F. 304.

II.

Where an indictment is made a jurisdictional requirement by constitutional guaranty, defendant cannot, by waiving an invalid indictment, confer jurisdiction.

31 C. J. 872.

III.

Defects in substance are not cured by verdict.

U. S. v. Hess, 124 U. S. 483;
U. S. v. Carll, 105 U. S. 611;
Shilter v. U. S., 257 F. 724;
Cohn v. U. S., 258 F. 355.

IV.

An indictment charging a statutory offense must allege all of the essential elements.

U. S. v. Carney, 228 F. 163.

V.

Failure to allege essential elements which are necessary to constitute the crime attempted to be charged does not waive the right to waive the question later.

31 C. J. 878.

VI.

The federal statute which provides that no indictment found by a federal grand jury shall be deemed insufficient by reason of any defect or imperfection in matter of form only that shall not prejudice the defendant does not permit the omission of matters of substance.

Horn v. U. S., 182 F. 721;
Renigar v. U. S., 172 F. 646;
Angle v. U. S., 172 F. 658;
U. S. v. Leach, 291 F. 788.

VII.

If, from the record or facts of which the Court may take notice, it appears that the conviction cannot stand, plain error appears on the record, and the judgment will be reversed.

Clyatt v. U. S., 197 U. S. 207;
Gambino v. U. S., 275 U. S. 310.

VIII.

An indictment must allege all the facts necessary to constitute the crime with which the defendant is charged, and, if it does not set forth such facts with sufficient certainty, it will not support a conviction.

People v. Picard, 284 Ill. 588;
People v. Stoyan, 280 Ill. 300.

Respectfully submitted,

HAROLD J. BANDY,
JOHN M. KARNS,
Counsel for Petitioners.

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PETITION

For Leave to Add an Authority to the Supporting Brief Filed by Petitioners in Support of Their Petition for Writ of Certiorari.

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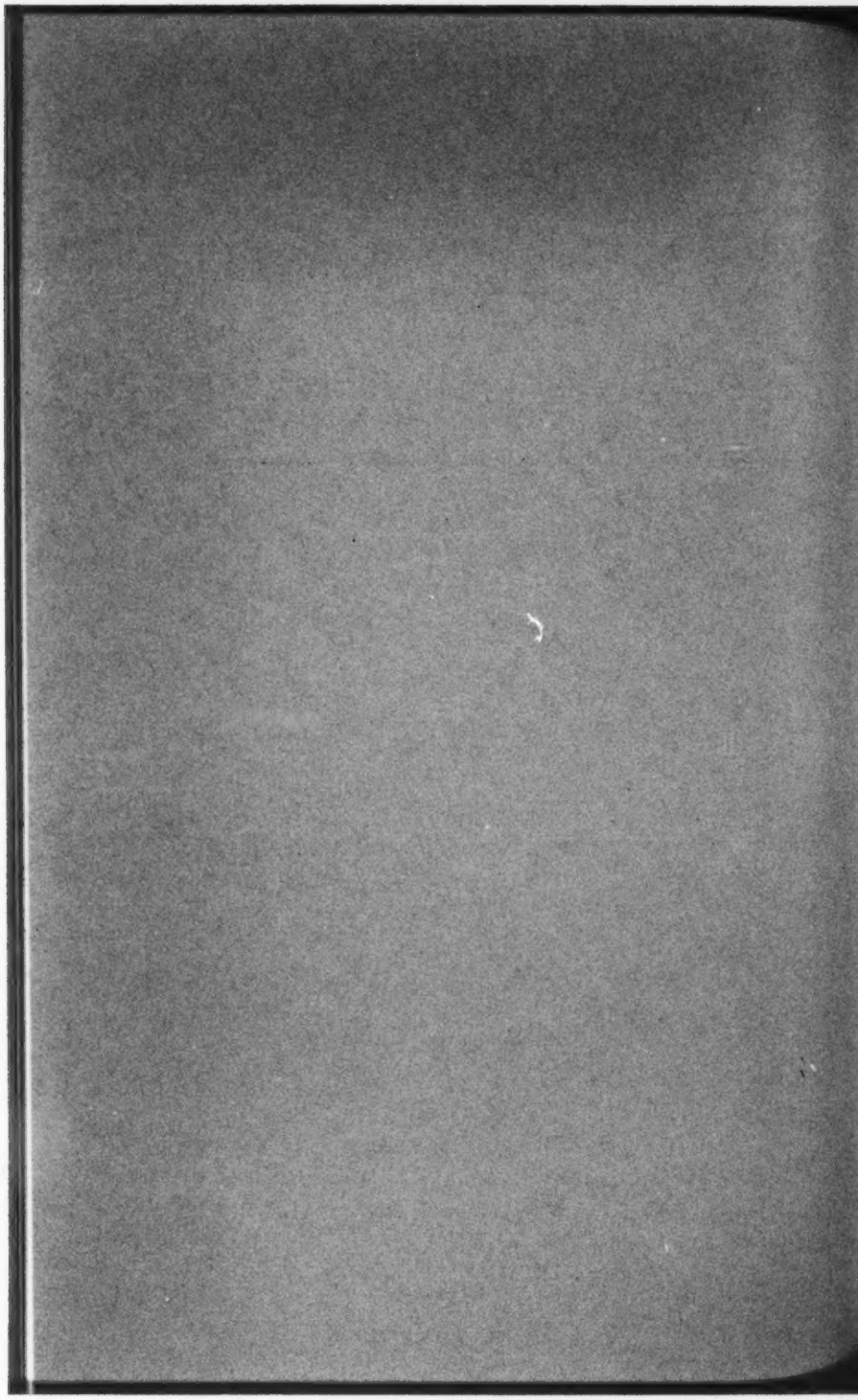

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PETITION

For Leave to Add an Authority to the Supporting Brief Filed by Petitioners in Support of Their Petition for Writ of Certiorari.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners in a supplemental petition for certiorari, entitled "Additional Reason Relied Upon For Allowance of Writ of Certiorari," contend that the counts upon which these convictions have been affirmed do not charge a violation of any law of the United States because the statute

under which they were indicted and prosecuted relates only to rectifiers and wholesale liquor dealers and the counts of the indictments in this case fail to allege that petitioners were either rectifiers or wholesale liquor dealers. That is, the counts of these indictments fail to bring petitioners within the classes of people which the statute regulates.

In further support of this contention, **petitioners respectfully petition this Honorable Court for permission to cite the case of Shaw v. United States, ~~229~~ 292 F. 339.**

In that case the defendant, an employee of a national bank which was a federal reserve bank, was indicted and prosecuted for embezzlement under a statute (12 U. S. C. A., Section 592), which makes it a criminal offense for any officer or employee of "any federal reserve bank or any member" to embezzle, etc. The indictment alleged the defendant was an employee of the national bank, but failed to aver that the national bank was a federal reserve bank.

The defendant did not challenge the indictment in the trial court by motion to quash, demurrer, motion in arrest of judgment, or otherwise. However, when this defect was called to the attention of the Court of Appeals for the Eighth Circuit, that court held that the omission constituted a fatal defect in substance, and that the defendant had not waived the question although he had pleaded to the indictment and had not attacked it in the trial court.

The omission in the Shaw indictment which the Court held to be fatal is exactly the same as the omission in the indictments against petitioners. In the Shaw case the indictment failed to allege that the bank from which the money was embezzled was a federal reserve bank, and it thereby failed to bring the defendant within the classifica-

tion made by the statute upon which the prosecution was predicated. In this case the indictments fail to allege that petitioners were wholesale liquor dealers, and they thereby fail to bring petitioners within the classification which is made by Title 26, U. S. C. A., Section 1208, the statute upon which this prosecution is based.

Respectfully submitted,

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